BEFORE
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 2017-281-E

In Re:	
Shorthorn Solar, LLC; Whitetail Solar, LLC, Rhubarb One LLC, Cotton Solar, LLC, Rollins Solar, LLC; Juniper Solar, LLC; Meslam Solar, LLC; Culpepper Solar, LLC; Ashley Solar, LLC; Jefferson Solar, LLC; Madison Solar, LLC; Fairfield Solar, LLC; Bell Solar, LLC; Webster Solar, LLC; B&K Solar Farm, LLC; GEB Solar, LLC; Ross Solar, LLC; Azalea Solar LLC; Cardinal Solar LLC; Sunflower Solar LLC; Cosmos Solar LLC; Zinnia Solar LLC; Chester PV1, LLC; Ninety-Six PV1, LLC; Newberry PV1, LLC; Bradley PV1, LLC; Jonesville PV1, LLC; Ft. Lawn PV1, LLC; and Mt. Croghan PV1, LLC,	**DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S RESPONSE IN OPPOSITION TO COMPLAINANTS' PETITION TO REHEAR OR RECONSIDER ORDER NO. 2019-45-H**
Complainants/Petitioners,	
v.	
Duke Energy Carolinas, LLC and Duke Energy Progress, LLC,	
Defendants/Respondents.	

Pursuant to S.C. Code Ann. § 58-27-2150, S.C. Code Ann. Regs. §§ 103-825 & 103-854, Rule 60 of the South Carolina Rules of Civil Procedure and the Commission's previous rulings, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (together, "Duke" or the "Companies"), through counsel, hereby submit this Response in Opposition to Complainants' Petition to Rehear or Reconsider Order No. 2019-45-H ("Response"). In support of this Response, the Companies state as follows:

I. PROCEDURAL BACKGROUND

Complainants' Petition asks the Hearing Officer assigned to this case[1] to reconsider Hearing Officer Order No. 2019-45-H, issued on April 3, 2019 (the "Order"), which denied Complainants' request to take the matter out of abeyance and to set a hearing date. Citing to the fact that "discovery has been an ongoing issue in this docket for some time," the Order instead granted the Companies' request to continue holding the matter in abeyance for an additional 60 days to finalize discovery in the proceeding. At the end of the 60-day period,[2] the parties are directed to contact the Hearing Officer to schedule a status conference in the case.

As background, this Complaint action was initiated on August 31, 2017, by certain solar developers on behalf of their qualifying facility ("QF") solar projects ("Complainants" or "Solar Developers"), alleging that the Companies are refusing to negotiate in good faith and to comply with their obligations to purchase the output of QFs under the Public Utility Regulatory Policies Act of 1978 ("PURPA") by offering forecasted avoided cost rates fixed over a term of five years. The Companies timely answered the Complaint on October 16, 2017.[3]

In order to investigate Complainants' allegations and to prepare their defense to the Compliant, the Companies served initial discovery consisting of interrogatories and requests for production of documents to each of the Complainants soon after the Complaint was filed, on September 9, 2017 ("First Request"), and served a second set of discovery to Complainants on October 20, 2017, ("Second Request"). Complainants also served discovery on the Companies on October 13, 2017.

[1] By Directive Order No. 201-669 (October 25, 2017).
[2] The 60-day period commencing on the date the Order was issued, April 3, 2019, concludes on June 2, 2019.
[3] Commission Order No. 2017-703 issued on November 8, 2017 consolidated a similar complaint filed in Docket No. 2017-321-E, which the Companies also timely answered on November 17, 2017.

While Duke answered Complainants' discovery within the time prescribed by the Commission's Rules, Complainants initially served only objections and failed to provide any substantive responses to the Companies' First Request and Second Request. The Companies subsequently filed a Motion to Compel on October 26, 2017, and the Hearing Officer issued Order No. 2017-72-H suspending all testimony filing deadlines and suspending the scheduled hearing date pending the Commission's ruling on the Companies' Motion to Compel. The Parties appeared before the Hearing Officer on November 15, 2017 to discuss Complainants' ongoing discovery deficiencies. The Hearing Officer's Proposed Prehearing Report was issued on November 22, 2017, finding that the Commission allows for broad discovery under 10 S.C. Code Ann. Regs. 103-833 and that "Complainants would respond to discovery to the best of their ability and describe any harm for not responding with particularity." The Report also directed Complainants to file any objections in the Docket to be ruled upon by the Hearing Officer and memorialized Complainants' commitment to "participat[e] in discovery to the fullest extent possible" with the goal of "allow[ing] Duke to understand the nature of the financing problem at the heart of the Complaint and allow for better cooperation towards settling the issue."

After extensive delays and continuing deficiencies in the information produced by Complainants in response to the Companies' First Request[4], counsel for the Companies and Complainants met on July 19, 2018, in an effort to resolve certain objections asserted by Complainants and to pursue more limited and targeted information that Complainants would agree to produce and that the Companies would review to determine whether such limited production of documents and responsive information was satisfactory to resolve the ongoing discovery disputes

[4] These ongoing deficiencies were memorialized in correspondence filed in the Docket on December 1, 2017, December 4, 2017, February 1, 2018, and, most recently, on March, 20, 2019.

related to the First Request. Following that meeting, Complainants agreed to produce certain additional documents in correspondence dated July 19, 2019 and July 20, 2019.

Despite their affirmative commitment, however, Complainants did not begin producing *any* new information until January of 2019—nearly six months later—when each produced some limited additional information and documents on a rolling basis. The Companies promptly reviewed the newly produced materials and, on February 27, 2019, sent Complainants a letter outlining a variety of remaining deficiencies, questioning whether any new documents or updated responses to the First Request existed in light of Complainants' significant delay in producing discovery, and forecasting additional discovery Duke intended to seek based on Complainants' pre-filed testimony. On March 18, 2019, Complainants circulated a joint response to that letter and, without giving the Companies any time to review, analyze, or respond, appealed to the Hearing Examiner via email to take the case out of abeyance and set a hearing schedule "at the earliest possible date." In response, and in an attempt to propose a reasonable compromise, the Companies proposed keeping the case in abeyance for an additional 60 days to allow the parties time to resolve remaining discovery issues. The Hearing Officer agreed with the Companies' proposal, memorialized the arrangement in his April 3, 2019 Order, and instructed the parties to contact him to schedule a status conference upon the expiration of 60 days after the Order.

In sum, this case has been suspended since November 2017 due to Complainants' persistent failure to participate in discovery, as well as extensive delays in providing promised responses to the Companies' interrogatories and requests for production of documents.

II. ARGUMENT IN OPPOSITION TO MOTION

As a threshold matter, Complainants' request for reconsideration is procedurally improper because they have failed to identify any alleged error in the Order that could serve as grounds for

reconsideration as required by S.C. Code Ann. Regs. § 103-825(4) (requiring a petition for rehearing or reconsideration to "set forth clearly and concisely . . . [t]he alleged error or errors in the Commission order."). As the Commission has previously ruled, "the purpose of a petition for rehearing and reconsideration is to allow the Commission to identify and correct specific errors and omissions in its orders." *In re S. C. Elec. & Gas Co.*, Order No. 2009-218, Docket No. 2008-196-E (Apr. 21, 2009). This standard is consistent with Rule 60 of the South Carolina Rules of Civil Procedure, which allows reconsideration of a court order only in the case of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which, through due diligence, could not have been discovered earlier; or (3) misrepresentation of an adverse party.

Here, Complainants have not set forth a single error of fact or law they believe was wrongly relied upon in the original Order and instead appear to suggest that the Hearing Officer should reconsider his ruling simply because of their own preference to move the matter forward more quickly than the ordered 60-day abeyance period would allow. As a matter of law, therefore, Complainants' position provides insufficient grounds for reconsideration of the Order, and the Commission has many times rejected petitions with similar deficiencies. *See In re S.C. Elec. & Gas Co.*, Order No. 2009-218 at 6 ("A general, non-specific and conclusory statement as to the alleged [error of law] is insufficient to put the Commission and parties on notice of any specific alleged . . . defect in the . . . Order."); Order No. 2003-641 at 6 ("a conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support [a petition for reconsideration]").

Complainants' position that the case must proceed immediately is also unreasonable in light of Complainants' persistent delay and avoidance of providing responsive discovery in this case. As set forth in detail *supra* in Section I, Complainants' response to the Companies' discovery

requests has been extremely protracted even in the face of prior admonitions by the Hearing Officer, as well as their affirmative agreement to provide specific responsive information in July 2018. After taking nearly a year-and-a-half to provide responses to the Companies' First Request that approach fulfillment of their duties under the Rules of this Commission and the South Carolina Rules of Civil Procedure, it is striking that Complainants now, suddenly, insist on accelerating the case without allowing the Companies the 60-day period granted by the Hearing Officer to pursue information from Complainants through proper means of discovery, to which the Companies are entitled in preparing their defense in this matter. It is also notable that, to date, Complainants have not provided any substantive responses to the Second Request and have also not provided any supplementation of their responses to the First Request as required by Rule 26(e) of the Rules of Civil Procedure.[5]

Complainants "alternative request" to hold the Docket in abeyance until May 10, 2019, in recognition of energy legislation, H.3659, currently pending at the General Assembly is also perplexing. Complainants aver that judicial economy will be served by holding the case in abeyance until after the current legislative session ends on May 9, 2019, as the legislation may have some bearing on the legal claims that Complainants have asserted in this case. After noting that any hearing in this proceeding "would not be held for some time," Complainants suggest that "holding the case in abeyance until May 10, 2019, instead of 60 days, will provide more than enough time to prevent any waste of judicial resources owing to the new legislation." However, the pending legislation has no bearing on Complainants' obligations to fully participate in

[5] Complainants' lack of supplementation of their initial responses to the First Request is notable because a central purpose of the First Request was to elicit information and documents regarding the Solar Developers' ongoing effort to develop and finance their QF projects at issue in the Complaint. Despite recent acknowledgment of their continuing duty to update their responses to discovery, Complainants' failure to supplement suggests that Complainants have either 1) not made any efforts to develop and finance their QF solar projects in the last fourteen months or 2) are wrongfully withholding such documents to gain an advantage in the proceeding.

discovery in this Complaint proceeding which they, themselves, initiated. Moreover, Complainants' purported desire to prevent the waste of judicial resources fails to recognize that limiting the time allowed for the parties to resolve ongoing discovery disputes will more likely require Commission involvement to compel discovery. Finally, to the extent Complainants believe that H.3659 impacts the Companies' implementation of PURPA as it relates to Complainants' QF projects, the Companies are prepared to discuss those issues with Complainants should this pending legislation be passed into law.

III. CONCLUSION

For all of the foregoing reasons, the Companies respectfully request that the Hearing Officer deny Complainants' Petition and allow the 60-day period of abeyance to continue as originally ordered.

Dated this 21st day of April, 2019.

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